In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-161

JACK ROSE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claimed an income tax deduction for 1966 in the amount of $3,000, representing attorney's fees paid by petitioner to counsel for his wife in a divorce action. Pursuant to court order, the payment was made from a fund which petitioner had deposited with the court. (Pet. App. 4-5.) Respondent disallowed the claimed deduction on the ground that the payment did not qualify as alimony or separate maintenance taxable to the wife under Section 71(a) of the Internal Revenue Code, which relates only to "periodic payments"; under Section 215 of the Code, the payment would be deductible by petitioner only if includible in his wife's income. The Tax Court upheld respondent's determination and the court of appeals affirmed. (Pet. App. 6, 10.)

Contrary to petitioner's sole contention (Pet. 2), he was afforded a full opportunity to be heard in the Tax Court. He presented evidence at the trial and argued his position in a brief. In fact, the Tax Court granted an exception to its rules and permitted petitioner to file his brief after that of respondent in order that he might rebut respondent's arguments.[1]

The Tax Court, in its discretion, properly overruled the request made in petitioner's brief for an additional hearing, since petitioner gave no indication of what new evidence he would produce. In support of its position that the payment in controversy was not alimony, respondent relied on the fact that the payment did not meet the express requirement of Section 71(a) that alimony or separate maintenance must be paid periodically. Since the payment was made as a lump sum from a fund deposited with the court, petitioner obviously could have produced nothing at an additional hearing which would qualify the payment as periodic. Accordingly, the Tax Court correctly concluded that anything petitioner could advance at the additional hearing would not change the result in this case. (Pet. 6.)

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

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[1] See Commissioner's brief in the Court of Appeals, Appendix B. The Tax Court's Rule 35(b) requires the taxpayer and the government to file their briefs simultaneously unless the court orders otherwise.

U.S. GOVERNMENT PRINTING OFFICE : 1972